IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

Writ Petition No. 2390 of 2005

Shri Kiran Appaso Swamy. petitioner

vs

Smt Premla Appasaheb

Swamy and ors .. Respondents

Mr P S Dani for petitioner

Mr G.S Godbole with G H Keluskar for respondents

CORAM;A.P.SHAH J.

Dated 3.l0.2005

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. Heard learned counsel for the petitioner as well as learned counsel for the respondent nos. 8 to ll who are original defendant nos. 8 to ll and are the only contesting parties in this petition.

2. The petitioner- plaintiff has filed a civil suit for partition in respect of various properties excluding the properties mentioned in para 3 of the plaint. It is the case of the petitioner that save and except the said properties all other properties are ancestral properties and the petitioner being the son of the deceased Appasaheb alongwith

defendant nos.l to 7 held jointly one half share in the said properties whereas defendant nos. 8 to ll jointly held the remaining half share in the said properties. The original defendant nos. 2 to 6 have filed their written statement supporting the petitioner. The defendant nos. 8 to l4 who are the contesting respondents have also filed their written statement in which they have clearly admitted that present petitioner alongwith defendant nos. 2 to 7 have got one half share in the suit properties. Thus in the written statement a definite stand was taken by the contesting defendants that the petitioner alongwith defendant nos. 2 to 7 have got one half share in the said properties. In view of this admission contained in the written statement the suit was liable to be decreed on the terms of the admission itself. The defendant nos. 8 to l4 , however, moved an application Exh 46 for amendment in the written statement for deleting para 8 and also adding para 8A in the written statement. By this amendment the contesting defendants wanted to contend that the petitioner and defendant nos 2 to 7 have no right, title and interest in the suit properties as they are illegitimate children of deceased Appasaheb. According to them Appasaheb initially married to

defendant no.l and as she had no issue he took defendant no.2 as his second wife after coming into force the Hindu Marriage Act, l955. Therefore the marriage solemnized between the deceased Appasaheb and defendant no. 2 was a nullity and consequently neither the defendant no.2 nor her children i.e. petitioner and defendant no. 3 to 7 are entitled to claim any share in the suit properties. The application Exh 46 was allowed by the trial court. Against that order the petitioner preferred writ petition being Writ Petition No. 7237 of 2003 which was allowed and the order of the trial court was set aside with liberty to the defendant nos. 8 to l4 to make a fresh application for amendment. The defendant nos. 8 to l4 thereafter filed application Exh 77 seeking similar relief for amendment of the written statement. That application was allowed by the trial court and that is how petitioner is before me in this petition.

3. In my view the order passed by the trial court allowing the withdrawal of the earlier admission of defendant nos. 8 to l4 in their written statement cannot be sustained and the reason is obvious. So far as petitioner and defendant nos. 2 to 7 are concerned the contesting defendants have

categorically admitted their one half share in the suit properties in their written statement. It is not permissible for the contesting defendants to withdraw the said admission which would seriously prejudice the plaintiff- petitioner. In Modi Spinning and Weaving Mills Co Ltd vs. Ladha Ram and Co, AIR l977 SC 680, Ray J., speaking for the Bench had to consider the question whether the defendants can be allowed to amend their written statement by taking an inconsistent plea as compared to the earlier plea which contained an admission in favour of the plaintiff . It was held that such an inconsistent plea which would displace the plaintiff completely from the admission made by the defendants in the written statement cannot be allowed. If such amendment is allowed in the written statement plaintiff will be irretrievably prejudiced by being denied the opportunity of extracting the admissions from the defendants . In that case a suit was filed by the plaintiff for claiming a decree for Rs. l,30,000 against the defendants. The defendants in their written statement admitted that by virtue of an agreement dated 7.4.l967 the plaintiff worked as their stokists-cum distributor. After three years the defendants by application under order VI, rule l7

sought amendment of written statement by substituting paras 25 to 26 with a new para in which they took the fresh plea that plaintiff was mercantile agent cum purchaser, meaning thereby they sought to go behind their earlier admission that plaintiff was stockists cum distributor. Such amendment was rejected by the trial court and the said rejection was affirmed by the High Court in revision. The said decision of the High Court was upheld by the Supreme Court by observing as aforesaid.This decision of three Judge Bench is a clear authority for the proposition that once written statement contains an admission in favour of the plaintiff by amendment such admission of the defendants cannot be allowed to be withdrawn, if such withdrawal would amount to totally displacing the case of the plaintiff and which would cause him irretrievable prejudice.

4. In Hiralal vs Kalyan Mal and ors, AIR l998 SC 6l8 the appellant - plaintiff had filed a civil suit for partition of l0 items of immovable properties mentioned in scheduled A of the plaint and also for partition of other properties listed in schedule B of the plaint. In the written statement a definite stand was taken by the

contesting defendants that out of the properties in schedule A only three properties at items 4,9 and l0 were exclusively belonging to the contesting defendants and were not joint family properties of the plaintiff and defendant nos.l and 2. Subsequently after a lapse of nearly 3 years an amendment was moved contending inter alia that because of incomplete information supplied by the defendant to his counsel the written statement came to contain the so called admission regarding 5 out of 7 items of the properties in schedule A and that he had suffered a heart attack in l989 and therefore when the written statement was moved in l993 this error crept in. The trial court rejected the application. The defendant no.l carried the matter in revision under section ll5 of the CPC before the Madras High Court.The High Court held that the admissions made earlier could be explained and could be given a go by in appropriate cases and as defendant no.l wanted to go behind his earlier admission which amounted to an inconsistent stand on his part, such an inconsistent stand in the written statement could not be said to be prohibited by the procedural law. Allowing the appeal a two Judge Bench of the Supreme Court held that the amendment if allowed would displace the

plaintiff's case and his right to get a partition decree and, therefore, amendment was not permissible. The Bench also pointed out that the decision of two Judge Bench in Akshaya Restaurant vs P Anjanappa, l955 Supp (2) SCC 303 on which reliance was placed in that case runs counter to the three Judge Bench decision in Modi Spinning and Weaving Mills Co Ltd's case (supra).Thus the law is clear that it is impermissible for the defendants to amend the written statement which would displace the plaintiff completely from the admissions made by the defendants in the written statement.

5 Mr Godbole, however, contended that the so called admission contained in the written statement is on law and as such admission would not bind the maker of the admission. I find absolutely no merit in the submission of Mr. Godbole inasmuch as admission contained in para 8 is not admission on law but is an admission on facts and it is not open for the contesting defendants to withdraw their admission.

6. In the result petition succeeds. The impugned order of the trial court is quashed and set aside.